

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRELL JENKINS,

Defendant-Appellant.

UNPUBLISHED

August 5, 2008

No. 276763

Calhoun Circuit Court

LC No. 2006-003730-FH

Before: Sawyer, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of attempted unlawful imprisonment, MCL 750.92; MCL 750.349b, and domestic violence, MCL 750.81(2).¹ The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to 4 to 15 years' imprisonment for the unlawful imprisonment conviction and to 93 days in jail for the domestic violence conviction. Because impossibility is not a defense to the crime of attempt, we affirm defendant's conviction for attempted unlawful imprisonment. We vacate defendant's sentence for attempted unlawful imprisonment and remand for resentencing because the record does not support the trial court's finding that defendant committed three crimes against a person in a five-year period. In addition, because the trial court ordered defendant to reimburse the county for the costs of his court-appointed attorney without consideration of his ability to pay, we vacate the portion of the judgment of sentence requiring defendant to pay attorney fees and remand for consideration of defendant's ability to pay.

I. Facts

Defendant and Lashanda Westry dated for approximately six years, and they have one daughter together. Their relationship ended in August 2006. The following month, Westry obtained a personal protection order against defendant.

Westry testified that, on September 22, 2006, her brother was baby-sitting her and defendant's daughter. That morning, her brother called and informed Westry that defendant, with the aid of local police officers, had taken their daughter from his house. Westry then called

¹ Defendant was acquitted of aggravated stalking, MCL 750.411i.

defendant to inform him that she was upset with him for taking their daughter. Thereafter, Westry and defendant exchanged numerous telephone calls. According to Westry, “He called me, I called him,” and they “just talked to each other.” Defendant spoke no unpleasant words over the telephone. Westry testified that the only unpleasant contact she had with defendant on September 22, 2006, occurred a few hours later in a parking lot.

At approximately 2:30 p.m., Westry met with a personal protection coordinator at the Calhoun County courthouse to discuss the possibility of entering a shelter. After the meeting, Westry walked to her car, which was parked across the street. As Westry was opening the driver’s side door, defendant approached her from behind. Defendant grabbed Westry, dragged her backwards, and tried to push her into the car. Wendy and Brittney Benoit saw Westry struggle with defendant and heard her cries for help. Wendy yelled at defendant, and while defendant was distracted, Brittney grabbed Westry by the arm. Together, Brittney and Westry ran to the police station. Defendant ran off.

II. Sufficiency of the Evidence

Defendant first claims on appeal that his conviction for attempted unlawful imprisonment was not supported by sufficient evidence. Specifically, defendant argues that because the evidence presented at trial could not establish the elements of aggravated stalking, which was the felony he was charged with attempting to facilitate by restraining Westry, the evidence was insufficient.

Defendant was charged and convicted of attempted unlawful imprisonment. A person commits the crime of unlawful imprisonment if he knowingly restrains another person “to facilitate the commission of another felony.” MCL 750.349b(1)(c). Defendant maintains that this phrase contemplates and requires the completion of “another felony.”² The prosecution charged defendant with attempting to restrain Westry to facilitate the crime of aggravated stalking, MCL 750.411i. “Aggravated stalking consists of the crime of ‘stalking,’ MCL 750.411h(1)(d), and the presence of an aggravating circumstance specified in MCL 750.411i(2).” *People v Threatt*, 254 Mich App 504, 505; 657 NW2d 819 (2002). Accordingly, a person cannot commit aggravated stalking unless he first engaged in stalking. Stalking involves “a willful course of conduct involving repeated or continuing harassment of another individual . . .” MCL 750.411i(1)(e). A “course of conduct” is defined as “a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose.” MCL 750.411i(1)(a).³

² If defendant is correct, a person cannot be guilty of unlawful imprisonment if, for whatever reason, upon restraining another person he does not complete “another felony.” We do not decide whether defendant is correct.

³ Harassment is “conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact . . .” MCL 750.411i(1)(d). Unconsented contact is “contact with another individual that is initiated or continued without that individual’s consent or in disregard of that individual’s expressed desire that the contact be avoided or discontinued.” MCL 750.411i(1)(f).

Defendant asserts that the evidence presented at trial established that he only engaged in one act involving harassment of Westry, his restraint of her in the parking lot. He claims that his telephone calls to Westry were not an act involving harassment because the calls were consensual and initiated by Westry. Because he could not have committed aggravated stalking even if the Benois had not interrupted his restraint of Westry, defendant claims that the evidence was insufficient to support his conviction for attempted unlawful imprisonment. Although defendant words his argument in terms of the evidence being insufficient to sustain his conviction, it is apparent, upon close examination, that he is setting forth an impossibility argument. He is arguing that, because it was impossible for him to commit unlawful imprisonment, he could not be convicted of attempted unlawful imprisonment.

The crime of attempt, MCL 750.92, requires the prosecution to prove (1) that the defendant intended to commit an offense prohibited by law and (2) the defendant committed an act toward the commission of that offense. *People v Thousand*, 465 Mich 149, 164, 166; 631 NW2d 694 (2001). In *Thousand*, our Supreme Court held that impossibility is not a defense to the crime of attempt. *Id.* at 152. It stated:

We are unable to discern from the words of the attempt statute any legislative intent that the concept of “impossibility” provide[s] any impediment to charging a defendant with, or convicting him of, an attempted crime, notwithstanding any factual mistake—regarding either the attendant circumstances or the legal status of some factor relevant thereto—that he may harbor. The attempt statute carves out no exception for those who, possessing the requisite criminal intent to commit an offense prohibited by law and taking action toward the commission of that offense, have acted under an extrinsic misconception.

. . . Instead, defendant is charged with the distinct offense of attempt, which requires only the prosecution prove intention to commit an offense prohibited by law, coupled with conduct toward the commission of that offense. The notion that it would be “impossible” for the defendant to have committed the *completed* offense is simply irrelevant to the analysis. Rather, in deciding guilt on a charge of attempt, the trier of fact must examine the unique circumstances of the particular case and determine whether the prosecution has proven that the defendant possessed the requisite specific intent and that he engaged in some act “towards the commission” of the intended offense.” [*Id.* at 165-166.]

Accordingly, defendant’s argument that, because he could not have committed unlawful imprisonment, he cannot be convicted of attempted unlawful imprisonment is without merit. We affirm defendant’s conviction for attempted unlawful imprisonment.

III. Offense Variable 13

Defendant next claims the trial court erred in scoring 25 points for offense variable (OV) 13, MCL 777.43. The trial court has discretion to determine the numbers of points to be scored, provided that record evidence supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We will uphold a scoring decision for which there is any evidence in support. *Id.* A sentencing factor need only be proved by a preponderance of the evidence.

People v Drohan, 475 Mich 140, 142-143; 715 NW2d 778 (2006); *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991).

Twenty-five points may be scored for OV 13 if “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43(1)(b). In scoring OV 13, “all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.” MCL 777.43(2)(a). Defendant concedes that his conviction for attempted unlawful imprisonment, the sentencing offense, must be counted for scoring OV 13. We agree with defendant that the record evidence fails to establish by a preponderance of the evidence that defendant committed two other felonies against a person within a five-year period.

Initially, we reject plaintiff’s argument that record evidence supports the scoring of OV 13 because, even though the jury found defendant not guilty of aggravated stalking, the evidence establishes that the offense was committed by a preponderance of the evidence. As already stated, a person cannot commit aggravated stalking unless he has first engaged in stalking, MCL 750.411i(2); *Threatt, supra*, which requires two or more separate acts involving harassment of another person, MCL 750.411i(1)(a), (e). While defendant’s conduct in the parking lot could constitute one act involving harassment of Westry, his telephone calls to Westry could not constitute a second act. The telephone calls were consensual and initiated by Westry; they were not unconsented contact by defendant. MCL 750.411i(1)(d), (f). Because defendant only engaged in one act involving harassment of Westry, the evidence fails to establish, even by a preponderance of the evidence, that defendant committed aggravated stalking. Thus, the charged offense of aggravated stalking cannot be counted as a crime in scoring OV 13.

Further, we agree with defendant that reliance on the charges listed in the presentence report for which defendant was arrested but which were subsequently dismissed is improper. The presentence report indicated that in a five-year period encompassing the sentencing offense, defendant was charged with kidnapping, third-degree criminal sexual conduct, felonious assault, and aggravated domestic violence. The charges were subsequently dismissed for reasons not indicated in the record. A dismissed charge can hardly be said to constitute actual evidence of the commission of a crime by a preponderance of the evidence. *Drohan, supra*; *Harris, supra*.⁴

Accordingly, the trial court’s finding that defendant committed three or more crimes against a person within a period of five years is not supported by the record. We vacate

⁴ The presentence report also indicated that defendant was charged with resisting or obstructing a police officer. Defendant pleaded nolo contendere to attempted resisting or obstructing a police officer, which resulted in a misdemeanor conviction. Defendant’s plea provided evidence from which the trial court could find by a preponderance of the evidence that defendant committed the charged offense. Thus, the evidence establishes that defendant committed, at most, two felonies against a person in a five-year period.

defendant's sentence for attempted unlawful imprisonment and remand for resentencing.⁵ On remand, the trial court may consider the dismissed charges for scoring OV 13, but only if it first determines by a preponderance of the evidence that defendant actually committed the offenses.

IV. Attorney Fees

Defendant finally claims that the trial erred in ordering him to reimburse the county \$400 for the costs of his court-appointed attorney without first determining whether he had the ability to pay. Because defendant did not object below, we review defendant's claim of error for plain error affecting his substantial rights. *People v Dunbar*, 264 Mich App 240, 251; 690 NW2d 476 (2004).

A trial court may not order an indigent defendant to reimburse the county for the cost of his court-appointed attorney without first assessing the defendant's ability to pay. *Id.* at 254-255. In the present case, there is no indication on the record that the trial court considered defendant's ability to pay. Accordingly, we vacate the portion of the judgment of sentence requiring defendant to pay attorney fees and remand "for a decision on attorney fees that considers [defendant's] ability to pay now and in the future." *People v Arnone*, 478 Mich 908; 732 NW2d 537 (2007).

Affirmed in part, vacated in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra

⁵ Because the legislative sentencing guidelines do not apply to the crime of domestic violence, MCL 750.81(2), see MCL 769.34(2); *People v Hendrick*, 472 Mich 555, 560; 697 NW2d 511 (2005), the trial court's scoring error does not affect defendant's sentence for domestic violence.